

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

WESTECH AEROSOL  
CORPORATION,

Plaintiff,

v.

ITW POLYMERS SEALANTS  
NORTH AMERICA INC.,

Defendant.

CASE NO. C17-5068-RBL

ORDER DENYING DEFENDANT'S  
MOTION TO DISMISS

DKT. #24

THIS MATTER is before the Court on Defendant ITW Polymers Sealants North America Inc.'s Second Motion to Dismiss [Dkt. #24] Plaintiff Westech Aerosol Corporation's Complaint.<sup>1</sup> Westech alleges ITW infringed its patent for a spray adhesive stored in a canister and applied with a spray gun. ITW argues Westech has pled no facts showing direct infringement, and so it asks the Court to dismiss Westech's complaint under Federal Civil Rule 12(b)(6) without leave to amend. Westech argues ITW's real issue is with the merits of

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<sup>1</sup> Westech also sued Wilsonart LLC for patent infringement. *See* Case No. 3:17-cv-5088-RBL. ITW and Wilsonart are represented by the same counsel, and each brought a motion to dismiss Westech's claims. The order in this case and in that one are substantially similar.

Westech's claims, which the Court cannot resolve on a motion for dismissal. It asks that if the Court concludes it must plead with more specificity, that it receive leave to amend.

### DISCUSSION

Westech claims ITW infringed its patent for an "Aerosol Adhesive and Canister-Based Aerosol Adhesive System," U.S. Patent No. 7,705,056. Its system includes "a gas cylinder canister, a hose, a spray gun, a hydrocarbon propellant, and an aerosol adhesive comprising a solvent mixture selected to have volatility characteristics for producing a specific spray pattern, a polymeric base in said solvent mixture, and a compressed gas dissolved in the solvent mixture." Dkt. #23 (Amended Complaint) at 3 (describing "claim one"). Westech alleges ITW's STA'-PUT SP80 Canister Adhesive infringes claim one of Patent '056 because it is also an aerosol adhesive canister system designed to spray an aerosol adhesive from the canister through a hose and spray gun. *See id.* at 4. More specifically, it "includes a canister containing a hydrocarbon propellant and an aerosol adhesive comprising a solvent mixture selected to have volatility characteristics for producing a specific spray pattern, a polymeric base in said solvent mixture, and a compressed gas dissolved in the solvent mixture." *Id.* at 4.

ITW argues Westech's complaint cannot satisfy the new pleading standard for patent infringement claims because it neglects describing the STA'-PUT's features. It suggests Westech omits these descriptions because it knows ITW's product does not infringe Westech's patent, and allowing Westech's meritless claims to advance would expose ITW to billions of dollars of discovery costs. It also argues that because Westech cannot sustain a direct infringement claim, its claims for contributory, induced, and willful infringement also fail.

Westech argues its complaint satisfies the Federal Rules' pleading requirements because it puts ITW on notice that the STA'-PUT infringes claim one of Patent '056. It argues any

1 additional and more specific facts are in ITW's sole control. It asks the Court to leave resolution  
2 of the merits for summary judgment, and if it decides against Westech, to grant it leave to  
3 amend.

4 **A. Standard of Review.**

5 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
6 theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v.*  
7 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff's complaint must allege  
8 facts to state a claim for relief plausible on its face. *See Aschcroft v. Iqbal*, 129 S. Ct. 1937, 1949  
9 (2009). A claim has "facial plausibility" when the party seeking relief "pleads factual content  
10 that allows the Court to draw the reasonable inference that the defendant is liable for the  
11 misconduct alleged." *Id.* "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]  
12 to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of  
13 a cause of action will not do. Factual allegations must be enough to raise a right to relief above  
14 the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and  
15 footnotes omitted). This requires a plaintiff to plead "more than an unadorned, the-defendant-  
16 unlawfully-harmed-me-accusation." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*).

17 On a 12(b)(6) motion, "a district court should grant leave to amend even if no request to  
18 amend the pleading was made, unless it determines that the pleading could not possibly be cured  
19 by the allegation of other facts." *Cook, Perkiss & Liehe v. N. Cal. Collection Serv.*, 911 F.2d 242,  
20 247 (9th Cir. 1990). However, where the facts are not in dispute, and the sole issue is whether  
21 there is liability as a matter of substantive law, the Court may deny leave to amend. *See Albrecht*  
22 *v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

1 **B. Direct Infringement Claim.**

2 ITW argues Westech must plead facts describing the STA'-PUT's features, and if  
3 Westech pled those facts, it would become obvious to the Court that ITW did not infringe on  
4 Westech's patent. For example, ITW alleges the STA'-PUT uses nitrogen, which is not a  
5 hydrocarbon, as its propellant; its solvent is methyl acetate, which is not a solvent mixture but a  
6 single solvent; and its compressed gas is nitrogen, but nitrogen does not dissolve in methyl  
7 acetate as Patent '056 requires.

8 Westech argues it need plead nothing more than the name of the accused product and the  
9 allegedly infringed patent claim number, but that it has gone beyond that requirement by  
10 "expressly stating that each separate limitation of the asserted claim can be found in the accused  
11 product." Dkt. #26 (Response) at 5. Westech also disputes ITW's contentions that it does not use  
12 a hydrocarbon propellant or a solvent mixture and that nitrogen cannot be a compressed gas  
13 dissolved in ITW's solvent mixture.

14 To state a claim for direct patent infringement, a plaintiff must allege that the defendant,  
15 "without authority[,] makes, uses, offers to sell, or sells any patented invention." 35 U.S.C.  
16 § 271(a); *see also Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993) (citing *Hewlett-*  
17 *Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990), *cert. denied*, 493  
18 U.S. 1076 (1990)). "To prove infringement, the patentee must show that an accused product  
19 embodies all limitations of the claim either literally or by the doctrine of equivalents." *Cephalon,*  
20 *Inc. v. Watson Pharms., Inc.*, 707 F.3d 1330, 1340 (Fed. Cir. 2013). "[T]o properly plead direct  
21 infringement under *Twombly* and *Iqbal*, a plaintiff must plausibly allege that a defendant directly  
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1 infringes each limitation in at least one asserted claim.” *Scripps Research Inst. v. Illumina, Inc.*,  
2 No. 16-CV-661 JLS (BGS), 2016 WL 6834024, at \*5 (S.D. Cal. Nov. 21, 2016).

3 Westech pleads ITW’s STA’-PUT infringes each limitation of claim one of Patent ‘056.  
4 Patent ‘056 protects a system where a gas cylinder canister shoots out an aerosol adhesive using  
5 a hose, spray gun, and hydrocarbon propellant. The adhesive comprises a compressed gas  
6 dissolved in a solvent mixture with a polymeric base. Westech alleges the STA’-PUT is a  
7 canister that uses a hose, spray gun, and hydrocarbon propellant to shoot an aerosol adhesive.  
8 The adhesive comprises a solvent mixture with a polymeric base in which a compressed gas is  
9 dissolved. Westech also pleads facts alleging ITW knew of this alleged infringement. Westech’s  
10 complaint sufficiently puts ITW on notice of how, and where, it claims the STA’-PUT infringes  
11 its patent. It has stated a plausible claim for direct infringement.

12 ITW objects to the veracity of Westech’s claims, and suggests it will lose billions  
13 performing needless discovery if the Court allows Westech’s claims to advance. In effect, it  
14 attempts to use its trade secrets as a sword and to force Westech to provide more specificity in its  
15 complaint than its patent. Westech disagrees with ITW’s position that it does not use a  
16 hydrocarbon propellant or a solvent mixture and that nitrogen cannot be a compressed gas  
17 dissolved in ITW’s solvent mixture. The Court cannot decide whether the STA’-PUT infringes  
18 Patent ‘056 on a motion to dismiss. If ITW does not use a hydrocarbon propellant, solvent  
19 mixture, or a compressed gas, ITW must supply the Court with supporting evidence—evidence  
20 in ITW’s possession only, and that if it exists, would not require much discovery to produce.

1 **C. Willful, Induced, and Contributory Infringement Claims.**

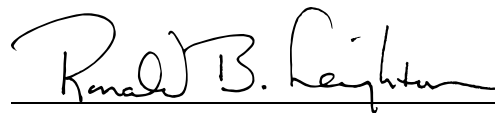
2 ITW argues that because Westech's claim for direct infringement fails, its other claims  
3 fail too. Westech sufficiently pled direct infringement, so on this ground, ITW's argument fails,  
4 and Westech's claims for willful, induced, and contributory infringement survive.

5 **CONCLUSION**

6 Westech's complaint sufficiently puts ITW on notice of the claims against it. ITW's  
7 Motion to Dismiss [Dkt. #24] is DENIED.

8 IT IS SO ORDERED.

9 Dated this 20<sup>th</sup> day of June, 2017.

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12 Ronald B. Leighton  
13 United States District Judge  
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